BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-262
	)	
Tier Buy-Through Prohibitions	)	

COMMENTS OF USA NETWORKS AND ESPN, INC.

In its Notice of Proposed Rulemaking ("NPRM"), the Commission has suggested that the anti-buy-through provision of the 1992 Cable Act (47 U.S.C. § 543(b)(8)) may be intended, and therefore should be implemented, to encourage the offering of cable program services on an a la carte basis to the fullest extent possible. USA Networks and ESPN, Inc. believe that the Commission has fundamentally misconceived Congressional purpose and sound public policy. In fact, the anti-buy-through provision does not in any respect limit the ability of cable operators to package services together, and it allows cable operators to offer discounts or other incentives to subscribers who elect to take such packages along with per channel or per program services. Therefore, the Commission should not interfere, as a matter of law or policy, with these practices.

1. At paragraph 7 of the NPRM, the Commission correctly states how the anti-buy-through requirement of Section 543(b)(8)(A)

works: subscribers who elect not to purchase intermediate tiers "are entitled to the same rate structure" for pay-per-view services as "subscribers purchasing" intermediate tiers. The Commission's analysis goes astray, however, in the discussion at paragraph 8 of the NPRM. This passage suggests that this requirement, coupled with increased addressability of equipment, "may mean -- and, indeed, may be intended by Congress to encourage" that channels offered today as a part of intermediate (or "expanded basic") tiers of service are to be "unbundled and offered on a per channel basis." NPRM at ¶ 8. The discussion suggests that the Commission may be considering the imposition of limits on the ability of cable operators to offer inducements or discounts to subscribers who elect to take expanded basic or other intermediate service packages as well as premium services. This line of reasoning is wrong as a matter of law and unsound as a matter of policy.

2. There is no support in either the terms of the anti-buy-through provision of the Act or in its legislative history to suggest that Section 543(b)(8) was intended to encourage the "unbundling" of program services. The Commission seems to have been heavily influenced by some language that appears in the Senate Committee report. See NPRM at ¶ 3.[1/] However, the Senate Committee specifically recognizes that there are "legitimate reasons" for the bundling of services together. Senate Report at 77. More

---

1/ Citing S. Rep. No. 102-92, 102nd Congress, 2d Sess. (1992) at 77. (Hereafter Senate Report.)

importantly, it was the House of Representatives' provision and approach to this question, not the Senate's, that became law. See Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992) at 61-62. The House approach, concurred in by the Senate in conference, makes clear that the packaging of services and the offering of discounts to induce subscriber acceptance of packages of service is legitimate and desirable.

3. The House analysis begins with the incontestable observation that "the diversity and quality of cable programming networks have improved and increased" in the eight years since the passage of the 1984 Cable Act, and that this is "especially true" with respect to "those cable networks generally offered as a part of a package to consumers." H. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) at 79. (Emphasis added.) The House Report further confirms that the anti-buy-through provision is not intended to effect a fundamental restructuring of the way in which cable programming networks and services are packaged. Rather, the anti-buy-through provision is intended to address only the pricing and packaging practices of those cable operators who have "abused their deregulated status." Id.

4. Certainly, the anti-buy-through provision does prohibit a cable operator from tying intermediate packages of service with those services that (by agreement between cable operator and programmer) are offered on a pay-per-view or pay-per-channel basis. In addition, cable operators are not permitted to penalize

subscribers who elect to "buy-through" from basic to premium or pay-per-view services. The Congress concluded that coercion -- the forced buying of intermediate packages as a "price" of subscriber access to premium and pay-per-view services -- is abusive. But, that is all the law prohibits and that is all it is intended to control. It is not meant to nor does it require or "encourage" the indiscriminate offering of services on an a la carte basis.

5. There are sound policy reasons for the Congressional refusal to broadly intrude (or permit the Commission to broadly intrude) into the ways in which cable operators and cable programmers package the program services they offer and carry. The "diversity and quality" of basic cable programming networks noted by the House Committee has come about precisely because the regulatory system has permitted the packaging of basic cable networks. This practice permits greater distribution for all cable networks and encourages them to be sampled by a maximum number of households. The resulting expanded reach has permitted basic cable networks, like USA and ESPN, to generate the revenues they need -- from both subscriber fees and advertising -- to improve programming and to launch new program services. For example, USA's recently initiated Sci-Fi Channel is unlikely to succeed as an a la carte offering; the growth of that channel is dependent upon access to as many homes as possible and the ability of subscribers to sample the new service. The packaging of services together

increases distribution and viewership for all program services, making improved quality and choice possible.

6. Of equal importance, the packaging of services together reduces the cost to subscribers of increased program choice. The direct cost of cable network programming represents a small portion of the cable operator's total cost of providing cable service. The principal cost burden involves fixed costs, such as plant, equipment and administration. The ability to place services into a package that appeals to a broad spectrum of subscribers enables cable operators to spread those fixed costs over the population of subscribers, reducing the rates charged for them. Packaging, therefore, affirmatively promotes consumer choice by permitting cable subscribers the opportunity to sample program services at affordable prices.

7. The theory that unbundling of cable program service should be promoted and encouraged to the fullest extent possible rests on false premises. Every cable network (and every over-the-air network) obtains greater distribution as a result of the bundling of services into broad-based packages. While individual subscribers might not choose a particular network separately, they are likely, nevertheless, to view the programs on such services on a periodic basis. The unbundling of services will reduce the audience of each program service. In order to offset the loss of both per subscriber and advertising revenues, the cable networks will have only one alternative -- increasing their per subscriber

fees. This action, coupled with the inability of the cable operator to spread fixed costs in ways which are economically rational, will force cable operators to increase their rates substantially for all program services. The inevitable result is that consumers will either pay dramatically more for the myriad of choices now available to them or receive a lot less for what they are now paying.

8. These results cannot be reconciled with the basic purposes of the Cable Act of 1992. Section 2 of the Act makes plain that the Commission's regulations should "promote the availability to the public of a diversity" of program choices,"rely on the marketplace" to achieve that availability to the maximum extent feasible, and "ensure" that cable operators continue to expand "where economically justified" the programs offered over their cable systems. P.L. 102-385 § 22)b)(1),(2),(3) (1992). Any attempt to indiscriminately induce or compel the unbundling of cable program services that are not intended to be offered on a premium basis will defeat the attainment of these goals. Such policies would disrupt the normal operations of the marketplace by irrationally treating all cable program services as premium or pay-per-view offerings. As a result, the "quality and diversity" of popular cable networks that the House of Representatives found so attractive would decline and the creation of new services would cease. In its implementation of the anti-buy-through requirements of Section 543(b)(8)(A) of the Cable Act of 1992, the Commission

can and must avoid these results. This can be readily accomplished by limiting the application of Section 543(b)(8)(A) to the specific practice which Congress found to be abusive -- coerced purchase of intermediate packages as the price of access to premium services.

9. The unfounded and unsound discussion of unbundling appearing at paragraph 8 of the NPRM leads the Commission to a set of questions. The Commission asks whether, and the extent to which, it should attempt to regulate discounts or other inducements offered to subscribers who elect to take intermediate service packages along with per channel or per program services. Given the narrow and specific purpose of the anti-buy-through provision, the answer clearly is that the Commission should not undertake any such effort. The Commission itself recognizes that the offering of inducements and discounts to subscribers who take intermediate service packages as well as pay-per-view services is not coercive. In fact, these types of discounts and inducements reflect cost and value of service (demand) realities. NPRM at ¶ 8. These types of arrangements promote and encourage program diversity.

10. In its implementation of the anti-buy-through provision, the Commission is not required to and should not attempt to regulate perfectly legitimate and desirable practices, particularly those which are in the public interest. The Commission should not attempt to encourage or induce the offering of program services on an a la carte basis, nor should it interfere with the offering of discounts designed to promote subscription to intermediate packages

by subscribers who also take services offered on an unbundled basis.

Respectfully submitted,

USA Networks

Of Counsel:

Ian D. Volner, Esq.
Cohn and Marks
Suite 600
1333 New Hampshire Ave., N.W.
Washington, DC 20036

By Stephen A Brenner
Stephen A. Brenner, Esq.
Senior Vice President,
Business Affairs,
Operations and General Counsel

ESPN, Inc.

By Edwin M Durso
Edwin M. Durso, Esq.
Executive Vice President
and General Counsel

January 12, 1993